

10
No. 87-1097

Supreme Court, U.S.

FILED

AUG 4 1988

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

OTIS R. BOWEN, SECRETARY OF HEALTH
AND HUMAN SERVICES,

Petitioner,
v.

GEORGETOWN UNIVERSITY HOSPITAL, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

**MOTION FOR LEAVE TO FILE
BRIEF AS *AMICUS CURIAE*
AND BRIEF OF OHIO POWER COMPANY
AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS**

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**MOTION FOR LEAVE TO FILE
BRIEF AS *AMICUS CURIAE***

Ohio Power Company hereby respectfully moves for leave to file the attached brief as *amicus curiae* in support of respondents in this case. Although the time for filing this brief has passed, the written consents of the attorneys for both the petitioner and the respondents have been obtained and are being filed with this motion.

The interest of the movant in this case arises from the fact that it is a party to a case in which the same issue has been raised, namely, whether the Administrative Procedure Act ("APA") prohibits an agency from promulgating retroactive rules upsetting past transactions between the government and a private party. On July 12, 1988, movant filed a petition for a writ of certiorari to the United States Court of Appeals for the District of

Columbia Circuit in which it asks this Court to consider that issue. *Ohio Power Co., et al. v. Thomas*, No. 88-60. Movant also has filed a motion asking this Court to defer consideration of that petition pending its decision in this case, because the resolution of the APA issue here may be dispositive of the *Ohio Power* petition. This Court's resolution of the APA issue therefore is of critical importance to the movant.

Movant's petition for certiorari in *Ohio Power* was filed less than thirty days ago, and movant has worked expeditiously since the filing of that petition to prepare its proposed *amicus* brief in this case. Moreover, movant has reviewed respondents' brief and the *amicus* briefs in support of respondents and believes that its proposed *amicus* brief would not be duplicative of these briefs, would provide a more detailed, historical analysis of the APA issue, and would demonstrate that this Court's resolution of that issue is important not only in the regulatory context of this case but also in other regulatory contexts.

More specifically, respondents' brief argues primarily as to construction of the Medicare statute and devotes relatively less time to the APA issue. The two *amicus* briefs that already have been filed focus more directly on the APA issue, but again in the context of the Medicare statute. Movant's brief, which is devoted exclusively to the APA issue, analyzes, among other things, the historical basis for the APA's proscription on retroactive rule-making and the importance of the APA issue in another regulatory context. These arguments are not presented in any other brief. Therefore, consideration of movant's brief would be helpful to the Court in its review of this case.

Movant understands that this case has been set for oral argument on October 11, 1988. Because Petitioner's reply brief is not due until a week before argument, *see* Supreme Court Rule 35.3, Petitioner will have ample

time to reply to movant's brief and will suffer no prejudice by the brief's late filing.

For these reasons, movant respectfully requests this Court to grant leave to file this brief as *amicus curiae*.

Respectfully submitted,

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QUESTION PRESENTED

Whether, absent an explicit statutory authorization to adopt retroactive rules that upset past transactions between the government and a private party, the Administrative Procedure Act precludes an agency from promulgating revised regulations that revoke rights conferred on a private party by the agency through an administrative determination completed in accordance with prior regulations?

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BRIEF OF OHIO POWER COMPANY
AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*

Ohio Power Company ("Ohio Power"), an operating subsidiary in the American Electric Power Company ("AEP") system, is the owner and operator of the Kammer Plant, a large electric generating facility located on the Ohio River in West Virginia. Ohio Power has filed a petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit regarding a decision affecting its Kammer Plant.¹ That petition asks this Court to review one of the issues presented by this case—whether the Administrative Proce-

¹ See *Ohio Power Co., et al. v. Thomas*, No. 88-60 (petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit filed July 12, 1988).

dure Act ("APA"), 5 U.S.C. § 551, *et seq.* (1982), permits an agency to promulgate revised regulations that revoke rights settled in an administrative proceeding conducted under prior regulations, where Congress has provided no specific statutory authority for rules to upset such past transactions between the agency and a private party.

The disposition of this case is critically important to *amicus*. Ohio Power spent over \$500,000 in the course of a four-year proceeding with the United States Environmental Protection Agency ("EPA"), to obtain in 1982 EPA's final approval under § 123(c) of the Clean Air Act, 42 U.S.C. § 7423(c) (1982), of a stack height dispersion "credit" for the Kammer Plant.² Because § 123 nowhere authorizes EPA to revoke or reevaluate a dispersion credit once approved, Ohio Power relied on the finality of the administrative proceeding in which it obtained the credit.

² Congress directed EPA in § 123 of the 1977 Clean Air Act Amendments to develop a program that would define the amount of dispersion "credit" to use in setting emission limits for individual sources pursuant to the National Ambient Air Quality Standards (NAAQS) established under § 109 of the Act. See Petition for Certiorari of Ohio Power Co., *et al.*, *supra* note 1, at 3-5. In § 123, Congress authorized the agency to adopt a general rule defining "good engineering practice" stack height dispersion credit that could be applied to sources that constructed stacks after 1970. Section 123(c) provides that EPA may allow credit greater than that allowed by this general rule in specific cases where "the source demonstrates, after notice and opportunity for public hearing, to the satisfaction of the Administrator, that a greater [stack] height is necessary" to avoid air quality problems.

Ohio Power obtained its stack height dispersion credit for the Kammer Plant under the § 123 rules then in effect, pursuant to the source-specific proceeding provided for in § 123(c). While any general stack height credit rule under § 123 may have a limited retroactive effect (i.e., § 123 applies to any stack constructed after 1970), § 123(c) nowhere provides, either explicitly or implicitly, for the revocation, expiration, or periodic reevaluation of credits approved by EPA after 1977 (when § 123(c) was enacted) in case-specific proceedings under that section.

Stack height dispersion credit, once determined for a source under § 123(c), serves as the basis for establishing that source's emission reduction obligations under the Clean Air Act.³ Ohio Power therefore designed its air pollution control program and entered into long-term coal supply contracts and other engagements with third parties based on the emission reduction obligations determined by that credit.

Years later, in revising its § 123 regulations, EPA imposed new requirements for obtaining a dispersion credit and ruled that the effect of those revisions was to revoke the credit Ohio Power previously had obtained for the Kammer Plant. The Court of Appeals affirmed. See *Natural Resources Defense Council ("NRDC") v. Thomas*, 838 F.2d 1224, 1244 (D.C. Cir. 1988).

The outcome of this case therefore will have a direct impact on *amicus*. If this Court were to interpret the APA as allowing an agency, without an explicit statutory authorization, to adopt rules that revoke administrative determinations completed under prior rules, Ohio Power's settled expectations under § 123 derived from the past administrative transaction with EPA would be defeated.⁴

³ Of course, if the health and welfare-based National Ambient Air Quality Standards (NAAQS) established under § 109 of the Act are revised in a manner that makes them more stringent, the Act requires that the agency determine whether more stringent emission limitations are needed to implement that new standard. See *Train v. Natural Resources Defense Council*, 421 U.S. 60 (1975). Any such determination, however, must be based on the applicable § 123 dispersion credit determined by EPA. See *supra* note 2.

⁴ The harsh impact of retroactive application of new regulations would extend beyond Ohio Power. For example, Ormet Corporation, a petitioner in *Ohio Power Co. v. Thomas*, No. 88-60, entered into aluminum supply contracts and other commitments based on the assumed availability of power from the Kammer Plant at a price that reflected the dispersion credit approved by EPA. Revocation of Ohio Power's existing stack height dispersion credit would endanger the continued existence of Ormet and the coal mine that currently supplies Kammer's needs. A more detailed discussion of

Given the close relationship of these cases, *amicus* has moved this Court to defer consideration of its petition for certiorari in *Ohio Power v. Thomas* until resolution of this case, and requests permission to file this brief in support of respondents in this case.⁵

SUMMARY OF ARGUMENT

Pursuant to the Constitution, Congress delegates power to administrative agencies to promulgate legislative rules executing the details of statutory pronouncements and regulating the affairs of private parties. The scope of an agency's power to determine the rights and duties of private parties depends on the breadth of authority granted in the statutory delegation. Where an agency has determined a party's rights pursuant to a statute that does not authorize the agency to reevaluate that determination, the party justifiably may expect that the agency may not revoke those previously determined rights by promulgating a revised rule.

Since earliest times, a central maxim of the common law has been that justice requires legislation to have prospective effect, except where the legislature expressly states its intention to the contrary. The Framers of the Constitution expressed a broad concern about the unfairness of retroactive legislation, and this principle found expression in the Constitution through several specific prohibitions on retroactive laws—the prohibition of *ex post facto* laws, bills of attainder, and laws impairing existing contractual obligations. In early cases construing these prohibitions, this Court made clear its distaste generally for statutes that “create[] a new obligation,

the implications of revocation of the EPA-approved dispersion credit is contained in the petition for certiorari filed in *Ohio Power Co. v. Thomas*, *supra* note 1.

⁵ Written consents to the filing of this brief have been obtained from the parties to this case, and have been filed with the clerk.

impose[] a new duty, or attach[] a new liability in respect to transactions or considerations already past.”⁶

Congress, in adopting the APA, defined the legislative powers of federal agencies in a manner that was consistent with the historical notion that legislation should only operate prospectively. The APA specifically provides that a rule is “an agency statement of general or particular applicability and *future effect*.” 5 U.S.C. § 551(4) (1982) (emphasis added). The legislative history is replete with discussion that confirms that a rule does not determine a party's rights or liabilities with respect to past conduct, but defines the future law so far as the agency is authorized to act. The common law and historical background, when combined with the language of the APA and its legislative history, leave no doubt that an agency given rulemaking powers in a statute cannot adopt rules that upset a past transaction between a private party and the agency, except where Congress has *explicitly* granted the agency the authority in the statute that the agency is administering to adopt such a rule.

ARGUMENT

Pursuant to the United States Constitution, Congress delegates power to administrative agencies to promulgate legislative rules executing the details of statutory pronouncements and regulating the affairs of private parties.⁷ The power delegated to such agencies can be no broader than the power originally residing in Congress.⁸

Agencies today exercise this delegated power largely through promulgating legislative regulations that de-

⁶ *Society for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13,156) (Opinion of Story, J.).

⁷ See, e.g., *Opp Cotton Mills v. Administrator of the Wage and Hour Division of the Department of Labor*, 312 U.S. 126 (1941); *United States v. Grimaud*, 220 U.S. 506 (1911).

⁸ *Lyng v. Payne*, 476 U.S. 926, 937 (1986).

termine either directly, or through subsequent individual determinations, the rights and duties of private parties.⁹ The scope of the statutory delegation to establish rules will affect private parties' reasonable expectations about the finality of their rights and obligations established under those rules. For example, where rights are established pursuant to a delegation that contemplates continuing agency review, private parties are on notice that rights established by an administrative determination are contingent on future rulemaking.¹⁰

By contrast, where a statute delegates to an agency the power to determine a party's rights but does not specifically authorize the agency to revoke those rights, an administrative determination creates settled expectations for the party whose rights have been determined.¹¹ Thus, an administrative determination that a party has complied with the statute as implemented through regulations then in effect, where Congress has not made that determination contingent upon subsequent regulatory developments, creates an expectation that the party has rights that may not be disturbed by subsequent admin-

⁹ K.C. Davis, *Administrative Law Treatise*, Vol. 1, § 1.9, at 34, § 6.1, at 448-49 (2d ed. 1978).

¹⁰ Thus, where a permit is issued for a set period of time, or is subject to continuing reevaluation pursuant to an evolving regulatory standard (e.g., a "just and reasonable" standard), there can be no justifiable expectation that the rights established in that permit will remain forever unchanged. *See, e.g.*, *Upjohn Co. v. FDA*, 811 F.2d 1583 (D.C. Cir. 1987); *American Airlines, Inc. v. CAB*, 359 F.2d 624 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966).

¹¹ *See, e.g.*, *United States v. Seatrains Lines, Inc.*, 329 U.S. 424, 430-33 (1947); *Hirschey v. FERC*, 701 F.2d 215, 220 (D.C. Cir. 1983); *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 291 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); *Chapman v. El Paso Natural Gas Co.*, 204 F.2d 46, 53-54 (D.C. Cir. 1952); *Utah International, Inc. v. Andrus*, 488 F. Supp. 976, 984-87 (D. Colo. 1980); *cf. American Methyl Corp. v. EPA*, 749 F.2d 826, 834-40 (D.C. Cir. 1984).

istrative proceedings, either rulemaking or adjudication.¹²

In the case now before this Court, respondents successfully challenged in the Court of Appeals an attempt by the Department of Health and Human Services ("HHS") to change through rulemaking respondents' right to funds received under earlier rules. The effect of HHS's new rule would have been to require respondents to return to the government monies that had been properly paid to respondents under the prior regulations. The Court of Appeals confirmed that the benefits flowing to the respondents under the rules then in effect could not be revoked by newly revised rules. To impose new burdens on respondents with respect to the earlier transaction between the agency and respondents, the court reasoned, would be inconsistent with the APA definition of a "rule" as a statement of *future* effect, *see* 5 U.S.C. § 551(4) (1982), where the statute being implemented did not supersede the APA by explicitly authorizing such regulations.¹³

Amicus is seeking a writ of certiorari in a case (*Ohio Power v. Thomas*)¹⁴ that also addresses whether an agency may use rulemaking proceedings to upset past administrative transactions that granted rights to private parties. The circumstances of that case bear many similarities to those of this case.

The statute involved in *Ohio Power* provides EPA with broad authority to act through rulemaking and through case-by-case informal adjudication, but does not provide for revocation of rights determined in administrative

¹² *See also infra* note 57.

¹³ *Georgetown University Hospital v. Bowen*, 821 F.2d 750, 757 (D.C. Cir. 1987).

¹⁴ *See supra* note 1 and accompanying text.

proceedings conducted under earlier rules.¹⁵ Moreover, like HHS in this case, EPA had exercised its statutory authority under prior regulations to define, “after notice and opportunity for a hearing,”¹⁶ the right of a private party to receive a benefit—in *Ohio Power*, a stack height dispersion credit to be used by the company in complying with Clean Air Act requirements at its Kammer Plant.¹⁷

As in this case, therefore, the previous regulatory transaction between the agency and the private party in *Ohio Power* established a right that the agency had no explicit statutory authority to take back.¹⁸ Nevertheless, EPA, like HHS here, concluded that revision of the rules which had governed the earlier transaction justified revocation of the rights of the private party established in that transaction.¹⁹

Notwithstanding the similarities between these two cases, the Court of Appeals in *Ohio Power* refused to give effect to the APA proscription against retroactive rules, even though it found that EPA’s new rules would have

¹⁵ See *supra* note 2.

¹⁶ Clean Air Act § 123(c).

¹⁷ As noted above, this credit has considerable monetary value to *amicus*. See *supra* pp. 2-3.

¹⁸ *Amicus* does not dispute that if in the future it seeks additional stack height dispersion credit for the Kammer Plant, it will be required to satisfy all of the criteria contained in the most recent version of EPA’s § 123 rules in order to qualify for that credit. Rather, *amicus* is concerned that the agency and the lower court have found that these new criteria, to the extent inconsistent with prior regulations, revoke any determinations made pursuant to those prior regulations. See *supra* pp. 2-3.

¹⁹ Indeed, in *Ohio Power*, unlike this case, the new rules were found to revoke the prior transaction even though EPA did not specifically address in the rulemaking the status of rights granted under prior rules. *NRDC v. Thomas*, 838 F.2d at 1249.

retroactive effect.²⁰ The only explanation given by the Court of Appeals for not applying the general APA proscription was the assertion that this rule would not affect “past transactions” but only “future emissions.”²¹

As discussed in *Ohio Power*’s petition for certiorari, the assertion that there is no “past transaction” is simply wrong.²² Moreover, the fact that “future” burdens will be imposed does not distinguish this rule from any other retroactive rule, since retroactive rules *always* impose only future burdens. Thus, revoking the Kammer dispersion credit will affect the plant’s “future emissions,” just as the repayment rule in this case will affect the hospitals’ “future” cash flow. The critical element in both cases is not the future burdens imposed by the rule, since every rule (even a retroactive rule) imposes only “future” burdens, but the fact that both rules serve to upset past completed transactions between private parties and the government.²³

Together, these cases raise important questions about an agency’s authority to revoke, through legislative rule-making, a private party’s rights established in a previous administrative transaction under the then-applicable agency regulations. For the reasons discussed below, this Court should confirm that the APA precludes legislative rules that revoke rights established in prior regulatory transactions, where Congress has provided the agency with no explicit authorization to revoke such rights.

²⁰ *Id.* at 1244. The court found that “[r]etroactivity is involved here” because the rule would affect “investments or other commitments [made] in reasonable reliance on prior understandings.” *Id.*

²¹ *Id.*

²² See Petition for Certiorari of *Ohio Power Co., et al.*, *supra* note 1, at 13-14.

²³ See also *infra* note 49 and accompanying text.

I. The Common Law of This Nation Presumes That Legislation Has Prospective Effect.

Since earliest times, a central maxim of the common law has been that a new statement of the law affects the future, not the past.²⁴ As early commentators recognized, justice requires that laws be prescribed or promulgated with respect to future conduct, to avoid penalizing parties as a result of transactions that were legal when completed.²⁵

American as well as English courts adopted this common law maxim as a rule of statutory construction. Courts therefore refused to give legislative acts retroactive effect unless their express language so provided.²⁶ Even then, retroactive laws were disfavored. As Chief Justice Kent explained, "[a] retroactive statute, affecting and changing vested rights, is very generally considered, in this country, as founded on unconstitutional principles, and consequently inoperative and void."²⁷

An equally well-established strand of American jurisprudence, reflected in the Constitution, views the presumption against retroactive laws as an inherent limitation on the legislative power. Thus, the Constitution at several points provides that a new law may not revoke or burden transactions completed before the enactment of the law, specifically prohibiting the most flagrant historical examples of such abuses of legislative power—*ex*

²⁴ Coke, 2 Inst. 292 ("Nova constitutio futuris formam imponere debet, et non praeteritis"). See generally Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775 (1936).

²⁵ 1 W. Blackstone, Commentaries *46. See also Smead, *supra* note 24, at 777.

²⁶ See, e.g., *Dash v. Van Kleeck*, 7 Johns. 477, 502 (N.Y. 1811) (opinion of Kent, C.J.) ("A statute ought never to receive such a construction, if it be susceptible of any other . . .").

²⁷ 1 Kent, Commentaries *455.

post facto laws, bills of attainder, and laws impairing existing contractual obligations.²⁸

Beyond these specific prohibitions, the Framers also expressed a broader concern with retrospective legislation. For example, Madison in the *Federalist Papers* described such legislation as "contrary to the first principles of the social compact and to every principle of sound legislation."²⁹ To the Framers, the atmosphere of uncertainty and arbitrariness created by legislative interference with past transactions would frustrate their desire that government "inspire a general prudence and industry, and give a regular course to the business of society."³⁰

Since the early days of this country, therefore, legislation that upsets previously established rights by imposing new burdens on the exercise of those rights has been disfavored. As Justice Paterson noted in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), construing the *ex post facto* clause shortly after adoption of the Constitution:

I had an ardent desire to have extended the provision in the Constitution to retrospective laws in general. There is neither policy nor safety in such laws; and, therefore, I have always had a strong aversion against them. It may, in general, be truly observed of retrospective laws of every description, that they neither accord with sound legislation, nor the fundamental principles of the social compact.³¹

²⁸ U.S. Const. art. I, § 9, cl. 3; *id.* § 10, cl. 1. See also *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 389 (1798) (cataloguing extreme instances of abuse under English law); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1866) (same).

²⁹ *The Federalist* No. 44, at 282 (J. Madison) (C. Rossiter ed. 1961).

³⁰ *Id.* at 283.

³¹ *Calder v. Bull*, *supra*, 3 U.S. (3 Dall.) at 397 (opinion of Paterson, J.). See also *id.* at 391 (opinion of Chase, J.) ("[I]t is a good general rule, that a law should have no retrospect. . .").

While *Calder v. Bull* restricted the *ex post facto* clause to criminal cases, Justice Paterson's "ardent desire" found further voice in the early interpretations of the contracts clause, which the Court read expansively to accommodate its distaste for retroactive legislation. Thus, Chief Justice Marshall early expressed dissatisfaction with *Calder v. Bull*, noting that a civil law that revoked vested rights would operate with the same injustice as an *ex post facto* law.³² Justice Story based his opposition to retrospective legislation "upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals. . . ." ³³

³² *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810) ("Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing, for public use, the estate of an individual in the form of a law annulling the title by which he holds that estate? The court can perceive no sufficient grounds for making this distinction. This rescinding act would have the effect of an *ex post facto* law."). See also *New Jersey v. Wilson*, 11 U.S. (7 Cranch) 164 (1812) (Marshall, C.J.).

³³ *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 52 (1815). See also *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 12 (1823).

By the time of *Satterlee v. Matthewson*, 27 U.S. (2 Pet.) 380 (1829), Justice Johnson, who earlier had called the rule against retroactive legislation "a principle which will impose laws even on the Deity," *Fletcher v. Peck*, *supra*, 10 U.S. (6 Cranch) at 143, was ready to reconsider *Calder v. Bull* and give the prohibition of retroactive civil legislation an explicit constitutional status. 27 U.S. (2 Pet.) at 414 (concurring in judgment only). See also his appended note, 27 U.S. (2 Pet.) 681 (1829). After reviewing the opinions in that case, he concluded that

the learned judges could not then have foreseen the great variety of forms in which the violations of private right have since been presented to this court [T]he prohibition to pass laws violating the obligation of contracts is not a sufficient protection in private rights, and . . . the policy and reason of

Given the general distaste for retroactive legislation, this Court early on expressed its disfavor for "every statute which . . . creates a new obligation, imposes a new duty, or attaches a new liability in respect to transactions or considerations already past."³⁴ Over time, the Court addressed a diverse set of transactions between the government and private parties in applying this general rule against retroactive legislation,³⁵ including transactions between private parties and the Executive Branch departments exercising delegated congressional power.³⁶

Thus, well before the advent of the administrative state, the Court recognized in *United States v. MacDaniel* that "usages" not specifically described in a statute would of necessity evolve in departments of the federal government as a means of executing congressional statutes.³⁷ Reflecting the historical view that legislation has prospective effect, the Court held that "no change of such usages

the prohibition to pass *ex post facto* laws does extend to civil as well as criminal cases.

Id. at 685-86. With regard to the contracts clause cases, the Justice remarked that "[t]his court has had more than once to toil up hill in order to bring within the restriction . . . the most obvious cases to which the Constitution was intended to extend its protection. . . ." *Id.* at 686.

³⁴ *Society for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13,156) (opinion of Story, J.) (emphasis added). See also *Calder v. Bull*, 3 U.S. (3 Dall.) at 391 (Chase, J.) ("Every law that . . . impairs . . . rights vested, agreeably to existing laws, is retrospective. . .").

³⁵ See, e.g., *State Bank v. Knoop*, 57 U.S. (16 How.) 369 (1853) (bank charter); *Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) (college charter); *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819) (debtors' obligations); *New Jersey v. Wilson*, 11 U.S. (7 Cranch) 164 (1812) (tax exemption); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) (legislative land grant).

³⁶ See, e.g., *United States v. MacDaniel*, 32 U.S. (7 Pet.) 1, 14-15 (1833).

³⁷ *Id.*

can have a retrospective effect, but must be limited to the future. [Past] [u]sage[s] . . . must be considered binding on past transactions.”³⁸

This historical distaste for retroactive legislation has been consistently echoed in the decisions of this Court. A century after *MacDaniel*, this Court reiterated that “legislation must be considered as addressed to the future, not to the past . . . [and] a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.”³⁹ And shortly before enactment of the APA, the Court reaffirmed that this rule applies to the delegates of congressional power as well as to the Congress itself.⁴⁰

II. The APA Codified the Common Law Principle That Legislative Pronouncements Have Prospective Effect.

Transactions between private parties and the government burgeoned with the growth in the number and responsibilities of federal agencies during the first part of this century. Thus, the decade 1905-1915 “first saw the grant of substantial rule-making, rule-enforcement, and adjudicative powers to executive offices and independent

³⁸ *Id.* The Court therefore prohibited the Secretary of the Navy from applying retroactively a new interpretation of a statute to vitiate a transaction completed under an earlier interpretation.

³⁹ *Union Pac. R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913). See also *Greene v. United States*, 376 U.S. 149, 160 (1964); *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141, 164 (1944).

⁴⁰ *Miller v. United States*, 294 U.S. 435, 439 (1935) (“The law is well settled that generally a statute cannot be construed to operate retrospectively unless the legislative intention to that effect unequivocally appears An administrative regulation is subject to the rule equally with a statute; and accordingly, the regulation here involved must be taken to operate prospectively only.”).

administrative agencies. . . ,”⁴¹ and administrative agencies began increasingly to exercise their responsibilities through informal rulemaking.⁴² Reflecting these developments, Elihu Root, then-President of the American Bar Association, observed in 1916 that “[i]f we are to continue a government of limited powers, these agencies of regulation must themselves be regulated The rights of the citizen against them must be made plain.”⁴³

Against this background of concern with the fairness of the administrative process and with the scope of agency power,⁴⁴ Congress in 1941 began consideration of legislation to define the parameters within which agencies would exercise their delegated legislative and adjudicatory authorities. In 1946, Congress enacted the APA and described in it the nature of agency authority to prescribe “rules” governing the conduct of private parties.⁴⁵

Consistent with the historical understanding that legislation applies prospectively, Congress defined a “rule” (the term used to describe agency-created legislation) as “an agency statement of general or particular applicability and future effect.”⁴⁶ Thus, the language “future effect” unambiguously categorizes agency-made legislation as “prospective” legislation, that is, legislation that operates on “future cases only” as opposed to “retrospective” legislation that “may also embrace transactions occurring before” its adoption.⁴⁷

⁴¹ J.W. Hurst, *Law and Social Order in the United States* at 40 (1977), quoted in Davis, *supra* note 9, at 18-19.

⁴² See Davis, *supra* note 9, at 18, 448-49.

⁴³ 41 A.B.A.R. 355, 368-369 (1916), quoted in Davis, *supra* note 9, at 19 (emphasis added).

⁴⁴ See Davis, *supra* note 9, at 20-21.

⁴⁵ See 5 U.S.C. § 551(4), § 553 (1982).

⁴⁶ 5 U.S.C. § 551(4) (1982) (emphasis added).

⁴⁷ Black's Law Dictionary 1075 (2d ed. 1933) (explaining that “[s]tatutes are . . . either prospective or retrospective” (emphasis in original)).

Had Congress viewed the rulemaking function of federal agencies to include the inherent power to undo or burden past transactions, one would expect that it would have made that intent clear, given the historical distaste for retroactivity pervading our legal system and the general thrust of the APA to define the overall limitations on the exercise of agency power. Congress certainly would not have used the words "future effect" to describe agency created legislation that Congress contemplated would be applied retroactively.

The legislative history confirms this view. Thus, during the final House proceedings on consideration of S.7, Representative Walter explained each provision of the bill. In addressing the definition of "rule," he noted that "[i]n rule making an agency is not telling someone what his rights or liabilities are for past conduct or present status under existing law. Instead, . . . the agency is prescribing what the future law shall be so far as it is authorized to act."⁴⁸ Similarly, the House Committee Report explains that "[r]ules' formally prescribe a course of conduct for the future rather than pronounce past or existing rights or liabilities."⁴⁹

⁴⁸ Senate Committee on the Judiciary, 79th Cong., 2d Sess., *Administrative Procedure Act—Legislative History* ("APA Legislative History") at 355 (1946) (emphasis added).

⁴⁹ *Id.* at 254 (emphasis added). Petitioner argues that the "future effect" language, which was a late amendment to the bill, see APA Legislative History at 20, was added merely to clarify that a rule may take effect only after promulgation. See Petitioner's Brief at 30-33 (citing APA Legislative History at 423). The effective date provision in § 4(c) of the Act, however, is so specific that a clarification of this nature would have been unnecessary and hardly worth the special effort an amendment required. See 5 U.S.C. § 553(d) ("Publication or service of any substantive rule shall be made not less than 30 days before its effective date . . ."). Rather, the phrase "future effect" only codified the common law understanding that a legislative pronouncement is presumed not to affect past transactions. Indeed, given the common law background and the general thrust of the APA, the effective date provision of § 4(c)

This view is also confirmed by an authoritative, contemporary interpretation of the Act. Thus, the *Attorney General's Manual* discusses the definition of "rule" and "rulemaking" as follows:

[Rules] must be of *future effect*, implementing or prescribing future law.

* * *

*Rule making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations. The object of the rule making proceeding is the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent's past conduct. . . .*⁵⁰

itself is most logically read as an indication that Congress intended to adopt the historical principle that legislation has prospective effect.

⁵⁰ United States Department of Justice, *Attorney General's Manual on the Administrative Procedure Act* at 13-15 (1947) (emphasis added). See also *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947) ("The function of filling in interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future" (emphasis added)).

Relying primarily on *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944), Petitioner contends that the common law before the APA's enactment did not disfavor the issuance of retroactive laws, and that the "future effect" language therefore should not be read to define "rules" as prospective legislation. See Petitioner's Brief at 22, 24. Petitioner's argument is contradicted by the very case he cites.

The Court in *Holly Hill* expressly confirmed the common law maxim that "law should avoid retroactivity as much as possible." 322 U.S. at 620. The dissenters (Justices Rutledge, Black, and Murphy) expressed the historical rule that legislation addresses the future in even stronger terms:

The administrative process has increasingly important functions in our legal system. Ordinarily it does enough, if it takes care of today and tomorrow. When it begins to add yesterday,

In sum, the "future effect" language of the APA codifies the historical, common law understanding that legislation applies prospectively.

III. Common Law Principles and the APA Require That Statutory Grants of Rulemaking Authority Be Construed as Authorizing Only Prospective Regulation, Absent an Explicit Statutory Authorization To Adopt Legislative Rules Affecting Past Transactions.

Courts have traditionally viewed legislation as determining rights and responsibilities for the future.⁵¹ Courts therefore adopted early on, as a principle of statutory construction, the presumption that legislation would have no retrospective effect unless plainly called for by Congress.⁵²

Agencies may exercise only that authority delegated by Congress.⁵³ Since a law that Congress passes cannot be applied retroactively unless that is the unequivocal import of its terms and the manifest intention of Congress,⁵⁴ an agency may not adopt a legislative rule with retrospective effect unless specifically authorized to do so by Congress.⁵⁵

Courts therefore have historically applied the presumption against retroactivity to include congressional dele-

without clear congressional mandate, the burden may become too great. In any event, that has not heretofore generally been considered its task.

Id. at 641-642. Far from signalling acceptance of retroactive legislation, therefore, *Holly Hill* firmly endorsed the common law presumption against such legislation.

⁵¹ See *supra* pp. 10-14.

⁵² See *supra* notes 26, 39.

⁵³ See *supra* note 8.

⁵⁴ *Supra* note 38 and accompanying text.

⁵⁵ See *Miller v. United States*, 294 U.S. at 439.

gations of administrative authority. As several Justices observed in *Addison v. Holly Hill Fruit Products* shortly before enactment of the APA, retrospective regulation "has not heretofore generally been considered [the agency's] . . . task. If that task is to be added, the addition should be made from the body whence administrative power is derived. . . ." ⁵⁶

Accordingly, an agency cannot revoke rights previously granted to a party, where there is no statutory authority to revoke those rights. This result must follow regardless of whether those rights were established through rulemaking or adjudication.⁵⁷

⁵⁶ 322 U.S. at 641 (Justices Rutledge, Black, and Murphy, dissenting).

⁵⁷ Other *amici* in this case focus on the distinction the APA draws between adjudication and rulemaking, pointing out the "future effect" limitation on legislative rules, and the absence of such language for adjudications. See Brief of *Amicus Curiae* the American Hospital Ass'n at 7-13; Brief of *Amici Curiae* Sister of Mercy Health Corp. and Michigan Hospital Ass'n at 14-15. Given the common law distaste for upsetting past transactions, however, retroactivity is discouraged even in the context of adjudication.

Thus, where a person was a party to a prior adjudication (i.e., where he was a party to a completed transaction with the agency), rights established in that transaction may not later be revoked in a subsequent adjudication absent explicit statutory authority to do so. See *United States v. Seatrain Lines, Inc.*, 329 U.S. 424, 430-33 (1947) (The Interstate Commerce Commission cannot revoke a certificate of public convenience and necessity previously issued to a water carrier, given the absence of explicit statutory authority.); *American Methyl Corp. v. EPA*, 749 F.2d 826, 834-40 (D.C. Cir. 1984); *Hirschey v. FERC*, 701 F.2d 215, 220 (D.C. Cir. 1983); *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 291 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); *Chapman v. El Paso Natural Gas Co.*, 204 F.2d 46, 53-54 (D.C. Cir. 1953). Even where a person who was *not* a party to a transaction with the agency relied on a legal principle established in another adjudication, that reliance, if justifiable, may not be upset absent an overriding statutory and public interest in retroactive application of that principle. See, e.g.,

The common law principle that agencies may not upset past transactions absent explicit statutory authority to do so has been codified as to legislative rulemaking by enactment of the APA.⁵⁸ The APA is "a measure . . . laying down definitions and stating limitations. These definitions and limitations must . . . [be] applied by agencies affected by them. . . ." ⁵⁹

Given the focus of the APA on defining the overall limits of agency authority, "the Administrative Procedure Act . . . must be read as part of every Congressional delegation of authority, unless specifically excepted." ⁶⁰ In interpreting any grant of rulemaking authority in a statute subject to the APA, therefore, the APA construction of that authority as being prospective only must be given effect in the absence of an explicit congressional authorization to adopt retroactive rules that upset or otherwise affect past administrative transactions.

In the instant case (accepting here respondents' characterization of the Medicare statute), as in *Ohio Power*,⁶¹ Congress has not explicitly provided for revocation or modification through rulemaking of rights previously es-

Retail, Wholesale & Dep't Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972).

In short, given the common law view that laws apply to the future, the authority of an agency to change retrospectively established rights does not depend upon the type of transaction in which the rights were established. Rather, if a person was a party to a transaction with the agency that established rights that the agency has no statutory authority to revoke, the proscription on retroactivity applies. By contrast, if a person merely relies on a legal principle that was never applied to him during a transaction with the agency, then retroactive application to him of a new principle will depend on a balancing of public and private interests.

⁵⁸ See *supra* pp. 14-18.

⁵⁹ APA Legislative History at 217 (Senate Report).

⁶⁰ *Hotch v. United States*, 212 F.2d 280, 283 (9th Cir. 1954).

⁶¹ See *supra* note 2 and accompanying text.

tablished in transactions between private parties and the government. As a result, neither HHS nor EPA have authority to upset those rights through rulemaking.

CONCLUSION

For these reasons, this Court should affirm the decision of the Court of Appeals in this case and clarify that the APA proscribes retroactive rulemaking. Such a ruling will promote the just administration of law by federal agencies, in a manner consistent with long-established constitutional and common law principles.

Respectfully submitted,

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August 4, 1988

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